

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Entergy Arkansas, LLC; Entergy Louisiana, LLC;)
 Entergy Mississippi, LLC; Entergy New Orleans,)
 LLC; and Entergy Texas, Inc.,)

Petitioners)

v.)

Federal Energy Regulatory Commission,)

Respondent.)

No. 23- 1151

PETITION FOR REVIEW

Pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825l(b), Rule 15(a) of the Federal Rules of Appellate Procedure and the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, petitioners Entergy Arkansas, LLC; Entergy Louisiana, LLC; Entergy Mississippi, LLC; Entergy New Orleans, LLC; and Entergy Texas, Inc., petition this Court for review of the following order of the Federal Energy Regulatory Commission (“FERC”), a copy of which is attached:

Midcontinent Independent System Operator, Inc., Order Addressing Arguments Raised on Rehearing, Docket No. ER22-496-002, 183 FERC ¶ 61,112 (May 18, 2023) (“May 2023 Order”).

The above-captioned Petitioners are transmission-owning members of Midcontinent Independent System Operator, Inc. (“MISO”), and load serving entities in the MISO region that are participants in the MISO-administered capacity and energy markets. The FERC order with respect to which the Petitioners seek review addresses MISO’s proposal to amend its Open Access Transmission, Energy, and Operating Reserves Tariff (“MISO Tariff”) to institute a “minimum capacity obligation” applicable to MISO market participants that represent load-serving entities in the MISO capacity market.

Petitioners intervened in the underlying FERC proceedings on December 14, 2021. FERC issued its order on the merits on August 31, 2022. *See Midcontinent Independent System Operator, Inc.*, 180 FERC ¶ 61,142 (Aug. 31, 2022). Petitioners timely requested rehearing on September 30, 2022. That request was denied by operation of law on October 31, 2022. Petitioners timely petitioned this Court for review of FERC’s August 31, 2022 order. *See* Case No. 22-1334. That case has been held in abeyance because FERC indicated it would issue another order in the underlying proceeding.

On May 18, 2023, FERC issued an order modifying the discussion in its August 31, 2022 order. Petitioners are mindful of this Court’s decision in *Sierra Club v. FERC*, No. 20-1512, Slip Op. at 23 (D.C. May 26, 2023), holding that in certain circumstances, it is unnecessary for a party to file a petition for review of a

FERC order amending a prior order that is already under review. Petitioners, however, file this petition for review of FERC's May 2023 Order in an abundance of caution. This petition for review is timely filed within sixty (60) days of the May 2023 Order in accordance with 16 U.S.C. § 8251(b). This Court has subject matter jurisdiction under 16 U.S.C. § 8251(b). Petitioners plan to seek consolidation of this case with the related Case No. 22-1334 currently pending before this Court.

Also attached to this Petition are: (1) the Corporate Disclosure Statement required by Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1; and (2) a Certificate of Service, with the list of parties to the underlying proceedings.

Respectfully submitted,

/s/ Michael Griffen

Michael C. Griffen
Entergy Services, LLC
101 Constitution Avenue, NW
Suite 200 East
Washington, DC 20001
(202) 530-7323
mgriffe@entergy.com

and

Marnie A. McCormick
Duggins Wren Mann & Romero, LLP
600 Congress Ave., Ste. 1900
Austin, Texas 78701
P.O. Box 1149
Austin, Texas 78767
(512) 744-9300
mmccormick@dwmrlaw.com

Attorneys for Entergy Arkansas, LLC;
Entergy Louisiana, LLC; Entergy
Mississippi, LLC; Entergy New Orleans,
LLC; and Entergy Texas, Inc.

June 14, 2023

**IN THE UNITED STATES COURT OF APPEALS
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Entergy Arkansas, LLC, Entergy Louisiana, LLC,)
 Entergy Mississippi, LLC, Entergy New Orleans,)
 LLC, Entergy Texas, Inc.,)

No. 22- 1151

Petitioners)

v.)

Federal Energy Regulatory Commission,)

Respondent.)

**CORPORATE DISCLOSURE STATEMENT OF
 ENTERGY ARKANSAS, LLC; ENTERGY LOUISIANA, LLC;
 ENTERGY MISSISSIPPI, LLC; ENTERGY NEW ORLEANS, LLC;
 AND ENTERGY TEXAS, INC.**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, Entergy Arkansas, LLC; Entergy Louisiana, LLC; Entergy Mississippi, LLC; Entergy New Orleans, LLC; and Entergy Texas, Inc. (the “Entergy Operating Companies”), provide the following Corporate Disclosure Statement.

The Entergy Operating Companies are utility operating subsidiaries of Entergy Corporation. Entergy Corporation is a public utility holding company organized under Delaware law and with its principal office in New Orleans, Louisiana. Entergy Corporation owns all or a majority of the outstanding shares of

stock of the Entergy Operating Companies, and no other publicly held corporation owns 10% or more of any Entergy Operating Company's stock.

The Entergy Operating Companies are engaged in the manufacture, generation, transmission, distribution, and sale of electric energy primarily in portions of Arkansas, Louisiana, Mississippi, and Texas.

The Entergy Operating Companies are transmission-owning members of Midcontinent Independent System Operator, Inc. ("MISO"), and load serving entities in the MISO region that are participants in the MISO-administered capacity and energy markets.

Respectfully submitted,

/s/ Michael Griffen

Michael C. Griffen
Entergy Services, LLC
101 Constitution Avenue, NW
Suite 200 East
Washington, DC 20001
(202) 530-7323
mgriffe@entergy.com

and

Marnie A. McCormick
Duggins Wren Mann & Romero, LLP
600 Congress Ave., Ste. 1900
Austin, Texas 78701
P.O. Box 1149
Austin, Texas 78767
(512) 744-9300
mmccormick@dwmrlaw.com

Attorneys for Entergy Arkansas, LLC;
Entergy Louisiana, LLC; Entergy
Mississippi, LLC; Entergy New Orleans,
LLC; and Entergy Texas, Inc.

June 14, 2023

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CERTIFICATE OF SERVICE

Pursuant to Rules 15(c) and 25 of the Federal Rules of Appellate Procedure and Rules 15(a) and 25 of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, I hereby certify that I have this 14th day of June 2023, served by email the foregoing Petition for Review and Corporate Disclosure Statement of the Petitioners on the Solicitor of the Federal Energy Regulatory Commission (“Commission”) and on all parties on the Commission’s service list in the underlying proceeding in Docket No. ER22-496-002.

Upon receiving a file-stamped copy of this Petition, I will cause a paper copy of it to be mailed to the Commission’s Solicitor and submitted to the Commission’s Secretary through the Commission’s eFiling system.

/s/ Michael Griffen

Michael C. Griffen
Entergy Services, LLC
101 Constitution Avenue, NW
Suite 200 East
Washington, DC 20001
(202) 530-7323
mgriffe@entergy.com

and

Marnie A. McCormick
Duggins Wren Mann & Romero, LLP
600 Congress Ave., Ste. 1900
Austin, Texas 78701
P.O. Box 1149
Austin, Texas 78767
(512) 744-9300
mmccormick@dwmrlaw.com

Attorney for Entergy Arkansas, LLC;
Entergy Louisiana, LLC; Entergy
Mississippi, LLC; Entergy New Orleans,
LLC; and Entergy Texas, Inc.

June 14, 2023

Federal Energy Regulatory Commission Recipients:

Hon. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Robert Solomon, Solicitor
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426
robert.solomon@ferc.gov

FERC Docket No. ER22-496 Service List Recipients:

See the attached official service list for FERC Docket No. ER22-496 maintained by the Secretary of the Federal Energy Regulatory Commission.



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Service List for ER22-496-000 Midcontinent Independent System Operator, Inc.

Contacts marked ** must be postal served

Party	Primary Person or Counsel of Record to be Served	Other Contact to be Served
Alliant Energy Corporate Services, Inc.	Andrew Cardon Managing Corporate Counsel Alliant Energy Corporate Services, Inc. 200 First Street SE Cedar Rapids, IOWA 52401 UNITED STATES andrewcardon@alliantenergy.com	
Ameren Services Company	Matthew Tomc Director and Assistant General Ameren Corporation 1901 Chouteau Ave MC 1310 St. Louis, MISSOURI 63040 UNITED STATES mtomc@ameren.com	Jamie Simler VP, Federal Regulatory Ameren Service Company, as agent for Union Electric d/b/a Ameren MS, Ameren IL Company d/b/a Ameren Ameren Transmission Company of IL 1331 PENNSYLVANIA AVE NW WASHINGTON, DISTRICT OF COLUMBIA 20004 JSimler@ameren.com
Ameren Services Company		Denice Simpson Regulatory Affairs Specialist Ameren Corporation 1331 Pennsylvania Ave, NW Suite 550 South Washington, DISTRICT OF COLUMBIA 20004 dsimpson@ameren.com
American Clean Power Association	Gabriel Tabak Counsel American Clean Power Association 1501 M St NW Washington, DISTRICT OF COLUMBIA 20005 UNITED STATES gtabak@cleanpower.org	Daniel Y Hall Central Region Senior Director American Clean Power Association 1501 M ST NW STE 900 WASHINGTON, DISTRICT OF COLUMBIA 20005 dhall@cleanpower.org
American Electric Power Service Corporation	Jessica Cano Asst. General Counsel - FERC AEP Service Corporation 1 RIVERSIDE PLZ COLUMBUS, OHIO 43215 UNITED STATES jacano@aep.com	
American Municipal Power, Inc.	Lisa McAlister Deputy General Counsel - FERC/ American Municipal Power, Inc. 1111 Schrock Road Suite 100 Columbus, OHIO 43229 UNITED STATES lmcaster@ampppartners.org	Gerit F. Hull Deputy General Counsel - Regul American Municipal Power, Inc. 1111 SCHROCK RD STE 100 COLUMBUS, OHIO 43229 ghull@ampppartners.org
American Municipal Power, Inc.		Christopher J Norton Director of Market Regulatory American Municipal Power, Inc. 1111 Schrock Road Suite 100 Columbus, OHIO 43229 cnorton@ampppartners.org
Arkansas Electric Cooperative Corporation	Jennifer Loiacano Staff Attorney Arkansas Electric Cooperative Corporation 1 Cooperative Way Little Rock, ARKANSAS 72209 UNITED STATES jennifer.loiacano@aecc.com	
Arkansas Public Service Commission	Justin Craig Commission Counsel Arkansas Public Service Commission	Glen Ortman glen.ortman@stinson.com

	1000 CENTER ST LITTLE ROCK, ARKANSAS 72201 UNITED STATES justin.craig@arkansas.gov	
Arkansas Public Service Commission		Keith Berry 38 River Ridge Circle Little Rock, ARKANSAS 72227 berry@hendrix.edu
Association of Businesses Advocating Tariff Equity	Michael Pattwell Attorney Clark Hill PLC 212 East Cesar E. Chavez Avenue Lansing, MICHIGAN 48906 UNITED STATES mpattwell@clarkhill.com	
Association of Businesses Advocating Tariff Equity	Omar Bustami Attorney Clark Hill PLC 1001 Pennsylvania Ave NW 1300 Washington, DISTRICT OF COLUMBIA 20004 UNITED STATES obustami@clarkhill.com	
Big Rivers Electric Corporation	John Lilyestrom Hogan Lovells LLP 555 Thirteenth St., NW Washington, DISTRICT OF COLUMBIA 20004 UNITED STATES john.lilyestrom@hoganlovells.com	Marlene S Parsley Director Resources and Forecas Big Rivers Electric Corporation 710 W 2ND ST OWENSBORO, KENTUCKY 42301 Marlene.Parsley@BigRivers.com
Calpine Corporation	Sarah Novosel Senior VP and Managing Counsel Calpine Corporation 717 TEXAS ST STE 1000 HOUSTON, TEXAS 77002 UNITED STATES snovosel@calpine.com	Brett Kruse Vice President, Market Design Calpine Corporation 717 Texas Ave. Suite 1000 Houston, TEXAS 77002 bkruse@calpine.com
Clean Grid Alliance	Natalie McIntire Senior Advocate Clean Grid Alliance 20 N WACKER DR STE 1600 NATURAL RESOURCES DEFENSE COUNCIL CHICAGO, ILLINOIS 60606 UNITED STATES nmcintire@nrdc.org	
Cleco Cajun LLC	Noel Symons Attorney McGuireWoods LLP 888 16TH ST NW STE 500 BLACK LIVES MATTER PLAZA WASHINGTON, DISTRICT OF COLUMBIA 20006 UNITED STATES nsymons@mcguirewoods.com	Colin Francis McGuireWoods LLP 2001 K St NW Washington, DISTRICT OF COLUMBIA 20006 cfrancis@mcguirewoods.com
Cleco Cajun LLC		Jill Kelone Cleco Corporation 2030 DONAHUE FERRY RD PINEVILLE, LOUISIANA 71360 Jill.Kelone@cleco.com
Cleco Corporate Holdings LLC	Noel Symons Attorney McGuireWoods LLP 888 16TH ST NW STE 500 BLACK LIVES MATTER PLAZA WASHINGTON, DISTRICT OF COLUMBIA 20006 UNITED STATES nsymons@mcguirewoods.com	Colin Francis McGuireWoods LLP 2001 K St NW Washington, DISTRICT OF COLUMBIA 20006 cfrancis@mcguirewoods.com
Cleco Corporate Holdings LLC		Jill Kelone Cleco Corporation 2030 DONAHUE FERRY RD PINEVILLE, LOUISIANA 71360 Jill.Kelone@cleco.com

Cleco Power LLC	Noel Symons Attorney McGuireWoods LLP 888 16TH ST NW STE 500 BLACK LIVES MATTER PLAZA WASHINGTON, DISTRICT OF COLUMBIA 20006 UNITED STATES nsymons@mcguirewoods.com	Colin Francis McGuireWoods LLP 2001 K St NW Washington, DISTRICT OF COLUMBIA 20006 cfrancis@mcguirewoods.com
Cleco Power LLC		Jill Kelone Cleco Corporation 2030 DONAHUE FERRY RD PINEVILLE, LOUISIANA 71360 Jill.Kelone@cleco.com
Coalition of Midwest Power Producers, Inc.	Scott Storms Coalition of Midwest Power Pro Coalition of Midwest Power Producers, Inc. 5898 Garden Gate Way Suite 300 Carmel, INDIANA 46033 UNITED STATES scott.storms@compp.org	Mark J Volpe mark.volpe@compp.org
Coalition of MISO Transmission Customers	Kenneth Stark McNees Wallace & Nurick LLC 100 PINE ST HARRISBURG, PENNSYLVANIA 17101 UNITED STATES kstark@mcneeslaw.com	Kevin M Murray Technical Specialist McNees Wallace & Nurick LLC 21 East State Street 17th Floor Columbus, OHIO 43215-4228 murraykm@mcneeslaw.com
Coalition of MISO Transmission Customers		Robert A Weishaar, JR McNees Wallace & Nurick LLC 1200 G Street, NW Suite 800 Washington, DISTRICT OF COLUMBIA 20005 bweishaar@mcneeslaw.com
Constellation Energy Generation, LLC	Christopher Wilson Director, Federal Regulatory A Constellation Energy Generation, LLC 101 Constitution Ave, NW Suite 400E Washington, DISTRICT OF COLUMBIA 20001 UNITED STATES FERCe-filings1@Constellation.com	cynthia brady Assistant General Counsel Exelon BSC-Legal Regulatory Exelon Business Services Company 4300 Winfield Road Warrenville, ILLINOIS 60555 cynthia.brady@exeloncorp.com
Constellation Energy Generation, LLC		John R. Orr, JR Vice President, Energy Policy Constellation Companies 1221 Lamar Street, Suite 700 Houston, TEXAS 77010 John.OrrJr@Constellation.com
Constellation Energy Generation, LLC		Jason C Barker Vice President, Regulatory Aff Exelon Business Services 931 Metfield Rd Towson, MARYLAND 21286 Jab@vcrenewables.com
Consumers Energy Company	Deborah Moss Principal Attorney 1730 Rhode Island Avenue NW Suite 1007 Washington, DISTRICT OF COLUMBIA 20002 UNITED STATES deborah.moss@cmsenergy.com	Emerson Hilton Assistant General Counsel One Energy Plaza Jackson, MICHIGAN 49201 emerson.hilton@cmsenergy.com
Cooperative Energy	Matthew Rudolphi Attorney Thompson Coburn LLP 55 E MONROE ST 37TH FLOOR CHICAGO, ILLINOIS 60603 UNITED STATES mrudolphi@thompsoncoburn.com	Joshua E. Adrian Thompson Coburn LLP 1909 K Street, NW Suite 600 Washington, DISTRICT OF COLUMBIA 20006 jadrian@thompsoncoburn.com
Cooperative Energy		Nathan T Bellville Regulatory Affairs Specialist

		South Mississippi Electric Power Association P.O. Box 15849 Hattiesburg, MISSISSIPPI 39404-5849 nbellville@cooperativeenergy.com
Council of the City New Orleans	David Shaffer Mr. Dentons US LLP 1900 K ST NW WASHINGTON, DISTRICT OF COLUMBIA 20006 UNITED STATES david.shaffer@dentons.com	
Council of the City New Orleans		Presley Reed, JR Partner Dentons US LLP 1900 K St. NW, Washington, DISTRICT OF COLUMBIA 20006 presley.reedjr@dentons.com
Council of the City New Orleans		Cassandra Mastrostefano Attorney Dentons US LLP 1900 K St NW WASHINGTON, DISTRICT OF COLUMBIA 20006 cassandra.mastrostefano@dentons.com
Council of the City New Orleans		Joseph W Rogers President Legend Consulting Group Limited 6041 S SYRACUSE WAY STE 105 GREENWOOD VILLAGE, COLORADO 80111 jrogers@legencdgl.com
Council of the City New Orleans		Erin Spears Chief of Staff, Council Utilit Council of the City of New Orleans, Louisiana 1300 Perdido Street Room 6E07 New Orleans, LOUISIANA 70112 espears@nola.gov
DTE Electric Company	Lauren Donofrio DTE Energy Company 215 S CASCADE ST FERGUS FALLS, MINNESOTA 56537 UNITED STATES lauren.donofrio@dteenergy.com	Adam Gamez DTE Electric Company 1 Energy Plaza Detroit, MICHIGAN 48226 adam.gamez@dteenergy.com
Duke Energy Corporation	Molly Suda Duke Energy Corporation 1301 PENNSYLVANIA AVE NW STE 200 WASHINGTON, DISTRICT OF COLUMBIA 20004 UNITED STATES molly.suda@duke-energy.com	
East Texas Electric Cooperative, Inc.		Alvin Taylor 1301 K Street, NW, Suite 1000 West Washington, DISTRICT OF COLUMBIA 20005 ataylor@mccarter.com
EDF Energy Services, LLC	Jason Cox Director, Regulatory Affairs EDF Energy Services, LLC 601 Travis Suite 1700 Houston, TEXAS 77002 UNITED STATES jason.cox@edfenergyservices.com	Karl Ebert Manager, Regulatory Reporting 601 TRAVIS ST STE 1700 HOUSTON, TEXAS 77002 Karl.Ebert@edfenergyservices.com
EDF Trading North America, LLC	Jason Cox Director, Regulatory Affairs EDF Energy Services, LLC 601 Travis Suite 1700 Houston, TEXAS 77002 UNITED STATES jason.cox@edfenergyservices.com	Karl Ebert Manager, Regulatory Reporting 601 TRAVIS ST STE 1700 HOUSTON, TEXAS 77002 Karl.Ebert@edfenergyservices.com
ENERGY MICHIGAN, INC.	Laura Chappelle Potomac Law Group, PLLC 120 N. Washington Square Suite 300 Lansing, MICHIGAN 48933	

	UNITED STATES lchappelle@potomacclaw.com	
Entergy Arkansas, LLC	Michael Griffen Entergy Services, Inc. 101 CONSTITUTION AVE NW STE 200E WASHINGTON, DISTRICT OF COLUMBIA 20001 UNITED STATES mgriffe@entergy.com	Andrea J Weinstein, ESQ VP. Federal Regulatory Affairs Entergy Services, LLC 101 CONSTITUTION AVE NW SUITE 200 EAST WASHINGTON, DISTRICT OF COLUMBIA 20001 aweinst@entergy.com
Entergy Louisiana, LLC	Michael Griffen Entergy Services, Inc. 101 CONSTITUTION AVE NW STE 200E WASHINGTON, DISTRICT OF COLUMBIA 20001 UNITED STATES mgriffe@entergy.com	Andrea J Weinstein, ESQ VP. Federal Regulatory Affairs Entergy Services, LLC 101 CONSTITUTION AVE NW SUITE 200 EAST WASHINGTON, DISTRICT OF COLUMBIA 20001 aweinst@entergy.com
Entergy Mississippi, LLC	Michael Griffen Entergy Services, Inc. 101 CONSTITUTION AVE NW STE 200E WASHINGTON, DISTRICT OF COLUMBIA 20001 UNITED STATES mgriffe@entergy.com	Andrea J Weinstein, ESQ VP. Federal Regulatory Affairs Entergy Services, LLC 101 CONSTITUTION AVE NW SUITE 200 EAST WASHINGTON, DISTRICT OF COLUMBIA 20001 aweinst@entergy.com
Entergy New Orleans, LLC	Michael Griffen Entergy Services, Inc. 101 CONSTITUTION AVE NW STE 200E WASHINGTON, DISTRICT OF COLUMBIA 20001 UNITED STATES mgriffe@entergy.com	Andrea J Weinstein, ESQ VP. Federal Regulatory Affairs Entergy Services, LLC 101 CONSTITUTION AVE NW SUITE 200 EAST WASHINGTON, DISTRICT OF COLUMBIA 20001 aweinst@entergy.com
Entergy Services, LLC	Michael Griffen Entergy Services, Inc. 101 CONSTITUTION AVE NW STE 200E WASHINGTON, DISTRICT OF COLUMBIA 20001 UNITED STATES mgriffe@entergy.com	Andrea J Weinstein, ESQ VP. Federal Regulatory Affairs Entergy Services, LLC 101 CONSTITUTION AVE NW SUITE 200 EAST WASHINGTON, DISTRICT OF COLUMBIA 20001 aweinst@entergy.com
Entergy Texas, Inc.	Michael Griffen Entergy Services, Inc. 101 CONSTITUTION AVE NW STE 200E WASHINGTON, DISTRICT OF COLUMBIA 20001 UNITED STATES mgriffe@entergy.com	Andrea J Weinstein, ESQ VP. Federal Regulatory Affairs Entergy Services, LLC 101 CONSTITUTION AVE NW SUITE 200 EAST WASHINGTON, DISTRICT OF COLUMBIA 20001 aweinst@entergy.com
Fresh Energy	Michael Schowalter Senior Policy Associate Fresh Energy 408 St. Peter St. Suite 350 Saint Paul, MINNESOTA 55102 UNITED STATES schowalter@fresh-energy.org	Allen Gleckner Fresh Energy - Senior Policy A 408 St. Peter Street Suite 220 Saint Paul, MINNESOTA 55105 gleckner@fresh-energy.org
Great Lakes Utilities	Cynthia Bogorad Spiegel & McDiarmid LLP 1875 Eye Street, N.W. Suite 700 Washington, DISTRICT OF COLUMBIA 20006 UNITED STATES cynthia.bogorad@spiegelmc.com	Jeffrey M. Bayne Attorney Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St., NW, Suite 700 Washington, DISTRICT OF COLUMBIA 20006 jeffrey.bayne@spiegelmc.com
Great Lakes Utilities		Anree G Little Associate Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St NW Ste 700 Washington, DISTRICT OF COLUMBIA 20006 Anree.little@spiegelmc.com
Great Lakes Utilities		E Service Spiegel & McDiarmid LLP 1875 Eye St, NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 eService@spiegelmc.com
Great Lakes Utilities		Troy J Adams tadams@mpu.org

Great River Energy	Donna Stephenson Associate General Counsel Great River Energy 12300 Elm Creek Blvd N Maple Grove, MINNESOTA 55369 UNITED STATES dstephenson@grenergy.com	
Hoosier Energy Rural Electric Cooperative, Inc.	Barry Cohen Special Counsel McCarter & English LLP 1301 K Street, N.W. Suite 1000 West Washington, DISTRICT OF COLUMBIA 20005 UNITED STATES bcohen@mccarter.com	
Illinois Commerce Commission	Christine Ericson Special Assistant Attorney Gen Illinois Commerce Commission 160 N. LaSalle St. Suite C-800 Chicago, ILLINOIS 60601 UNITED STATES Christine.Ericson@illinois.gov	Katharine McCormick Illinois Commerce Commission 160 N. LaSalle N925 Chicago, ILLINOIS 60601 katharine.mccormick@illinois.gov
Illinois Commerce Commission		William VanderLaan bill.vanderlaan@illinois.gov
Illinois Industrial Energy Consumers	Eric Robertson Senior Partner INDIVIDUAL 1939 Delmar Avenue P. O. Box 735 Granite City, ILLINOIS 62040 UNITED STATES erobertson@lrklaw.com	
Illinois Municipal Electric Agency	Michael Postar Attorney Duncan, Weinberg, Genzer & Pembroke PC 1667 K Street, N.W., Suite 700 Duncan Weinberg Genzer & Pembroke Washington, DISTRICT OF COLUMBIA 20006 UNITED STATES mrp@dwgp.com	Linda L. Murray-Kimball Legal Assistant Duncan, Weinberg, Genzer & Pembroke PC 1667 K Street, NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006-1654 lmk@dwgp.com
Illinois Municipal Electric Agency	Bhaveeta Mody Duncan, Weinberg, Genzer & Pembroke PC 1667 K ST NW STE 700 WASHINGTON, DISTRICT OF COLUMBIA 20006 UNITED STATES bkm@dwgp.com	Troy A Fodor Illinois Municipal Electric Agency 3400 Conifer Drive Springfield, ILLINOIS 62711 tfodor@imea.org
INDIANA INDUSTRIAL GROUP	Joseph Rompala Lewis & Kappes, P.C. Lewis & Kappes, P.C. One American Square Suite 2500 Indianapolis, INDIANA 46282 UNITED STATES jrompala@lewis-kappes.com	
Indiana Municipal Power Agency	Colten Mitchell Staff Counsel Indiana Municipal Power Agency 11610 North College Ave Carmel, INDIANA 46032 UNITED STATES coltenm@impa.com	Peter J. Prettyman Sr. V.P. & General Counsel Indiana Municipal Power Agency 11610 N COLLEGE AVE CARMEL, INDIANA 46032 pprettyman@impa.com
Indiana Office of Utility Consumer Counselor	Arthur Iler Deputy Consumer Counsel - Fede Indiana Office of Utility Consumer Counselor 115 W Washington St Ste 1500 South Indianapolis, INDIANA 46204	

	UNITED STATES ailer@oucc.in.gov	
Indiana Utility Regulatory Commission	Beth Heline General Counsel Indiana Utility Regulatory Commission Suite 1500 East 101 West Washington Street Indianapolis, INDIANA 46204 UNITED STATES BHeline@urc.in.gov	Steve L Davies Assistant General Counsel Indiana Utility Regulatory Commission 101 W. Washington Street, Suite 1500 E Indianapolis, INDIANA 46204 sdavies@urc.in.gov
Indianapolis Power and Light Company	Nicholas Grimmer Director, Fuel Supply Indianapolis Power & Light Company One Monument Circle Indianapolis, INDIANA 46204 UNITED STATES nick.grimmer@aes.com	Matthew D Fields Indianapolis Power & Light Company 1 MONUMENT CIR INDIANAPOLIS, INDIANA 46204 matthew.fields@aes.com
Indianapolis Power and Light Company	Randall Griffin Chief Regulatory Counsel The AES Corporation 1065 WOODMAN DR DAYTON, OHIO 45432 UNITED STATES randall.griffin@aes.com	
Kentucky Public Service Commission	Justin McNeil Executive Advisor Attorney Kentucky Public Service Commission 211 Sower Blvd Frankfort, KENTUCKY 40601 UNITED STATES Justin.McNeil@ky.gov	John E Pinney Executive Advisor Kentucky Public Service Commission 211 Sower Blvd P.O. Box 615 Frankfort, KENTUCKY 40602 jeb.pinney@ky.gov
Louisiana Public Service Commission	Noel Darce Attorney Stone Pigman Walther Wittmann L.L.C. 909 Poydras St. Suite 3150 New Orleans, LOUISIANA 70112-4042 UNITED STATES ndarce@stonepigman.com	Kathryn H Bowman Executive Counsel Louisiana Public Service Commission 602 N 5TH ST BATON ROUGE, LOUISIANA 70802 kathryn.bowman@la.gov
Louisiana Public Service Commission		Melissa Watson Deputy General Counsel Louisiana Public Service Commission 602 North Fifth Street Galvez Bldg, FL 12 Galvez Building, 12th Floor Baton Rouge, LOUISIANA 70821-9154 melissa.watson@la.gov
Madison Gas and Electric Company	Cynthia Bogorad Spiegel & McDiarmid LLP 1875 Eye Street, N.W. Suite 700 Washington, DISTRICT OF COLUMBIA 20006 UNITED STATES cynthia.bogorad@spiegelmc.com	Jeffrey M. Bayne Attorney Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St., NW, Suite 700 Washington, DISTRICT OF COLUMBIA 20006 jeffrey.bayne@spiegelmc.com
Madison Gas and Electric Company		Anree G Little Associate Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St NW Ste 700 Washington, DISTRICT OF COLUMBIA 20006 Anree.little@spiegelmc.com
Madison Gas and Electric Company		E Service Spiegel & McDiarmid LLP 1875 Eye St, NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 eService@spiegelmc.com
Madison Gas and Electric Company	Scott Smith Vice President, Business Regul Madison Gas & Electric Company 133 S BLAIR ST PO BOX 1231 MADISON, WISCONSIN 53788 UNITED STATES ssmith@mge.com	

Michigan Public Service Commission	Nicholas Taylor Assistant Attorney General Michigan Attorney General 7109 W Saginaw Hwy 3rd floor Lansing, MICHIGAN 48917 UNITED STATES taylorn10@michigan.gov	Steven D Hughey Assistant Attorney General Department of Attorney General 7109 W. Saginaw Hwy. 3rd Floor Lansing, MICHIGAN 48917 hugheys@michigan.gov
MidAmerican Energy Company	Kady Alexander Attorney MIDAMERICAN ENERGY COMPANY 666 GRAND AVE STE 500 DES MOINES, IOWA 50309 UNITED STATES kady.alexander@midamerican.com	
Midcontinent Independent System Operator, Inc.	Michael Kessler MISO PO Box 4202 Carmel, INDIANA 46082 UNITED STATES mkessler@misoenergy.org	Midwest ISO Midcontinent Independent System Operator, Inc. PO Box 4202 Carmel, INDIANA misolegal@misoenergy.org
Midcontinent Independent System Operator, Inc.	Jim Holsclaw jholsclaw@calfee.com	Julie Bunn Midcontinent Independent System Operator, Inc. 720 CITY CENTER DR CARMEL, INDIANA 46032 jbunn@misoenergy.org
Midcontinent Independent System Operator, Inc.	Matthew Barbara mbarbara@calfee.com	
Midcontinent Independent System Operator, Inc.	Midwest ISO Midcontinent Independent System Operator, Inc. PO Box 4202 Carmel, INDIANA UNITED STATES misolegal@misoenergy.org	
Midwest Municipal Transmission Group	Cynthia Bogorad Spiegel & McDiarmid LLP 1875 Eye Street, N.W. Suite 700 Washington, DISTRICT OF COLUMBIA 20006 UNITED STATES cynthia.bogorad@spiegelmc.com	Jeffrey M. Bayne Attorney Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St., NW, Suite 700 Washington, DISTRICT OF COLUMBIA 20006 jeffrey.bayne@spiegelmc.com
Midwest Municipal Transmission Group		Anree G Little Associate Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St NW Ste 700 Washington, DISTRICT OF COLUMBIA 20006 Anree.little@spiegelmc.com
Midwest Municipal Transmission Group		E Service Spiegel & McDiarmid LLP 1875 Eye St, NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 eService@spiegelmc.com
Midwest Municipal Transmission Group		Robert Jagusch rjagusch@mmua.org
Mississippi Public Service Commission	William Booth Partner Michael Best & Friedrich, LLP 1000 Maine Ave SW Suite 400 Washington, D.C., DISTRICT OF COLUMBIA 20024 UNITED STATES wdbooth@michaelbest.com	Roxane E Maywalt, ESQ Senior Counsel Michael Best & Friedrich, LLP 1000 MAINE AVE SW STE 400 WASHINGTON, DISTRICT OF COLUMBIA 20024 remaywalt@michaelbest.com
Mississippi Public Service Commission		Katherine Collier Mississippi Public Service Commission And Public Uti P.O. Box 1174 Jackson, MISSISSIPPI 39215 katherine.collier@psc.ms.gov

Mississippi Public Service Commission		David N Carr Special to the Commission for Mississippi Public Service Commission 501 N West St Jackson, MISSISSIPPI 39201 david.carr@psc.ms.gov
Mississippi Public Utilities Staff	William Booth Partner Michael Best & Friedrich, LLP 1000 Maine Ave SW Suite 400 Washington, D.C., DISTRICT OF COLUMBIA 20024 UNITED STATES wdbooth@michaelbest.com	Roxane E Maywalt, ESQ Senior Counsel Michael Best & Friedrich, LLP 1000 MAINE AVE SW STE 400 WASHINGTON, DISTRICT OF COLUMBIA 20024 remaywalt@michaelbest.com
Mississippi Public Utilities Staff		Emily Kruger General Counsel P.O. Box 1174 Jackson, MISSISSIPPI 39215-1174 Emily.Kruger@mpus.ms.gov
Missouri Joint Municipal Electric Utility Commission	Cynthia Bogorad Spiegel & McDiarmid LLP 1875 Eye Street, N.W. Suite 700 Washington, DISTRICT OF COLUMBIA 20006 UNITED STATES cynthia.bogorad@spiegelmc.com	Jeffrey M. Bayne Attorney Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St., NW, Suite 700 Washington, DISTRICT OF COLUMBIA 20006 jeffrey.bayne@spiegelmc.com
Missouri Joint Municipal Electric Utility Commission		Anree G Little Associate Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St NW Ste 700 Washington, DISTRICT OF COLUMBIA 20006 Anree.little@spiegelmc.com
Missouri Joint Municipal Electric Utility Commission		E Service Spiegel & McDiarmid LLP 1875 Eye St, NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 eService@spiegelmc.com
Missouri Joint Municipal Electric Utility Commission		John E Grotzinger INDIVIDUAL 1808 I-70 Drive SW Columbia, MISSOURI 65203 jgrotzinger@mpua.org
Missouri Joint Municipal Electric Utility Commission		Douglas L Healy 3010 E BATTLEFIELD ST STE A SPRINGFIELD, MISSOURI 65804 doug@healylawoffices.com
Missouri Public Service Commission	Rodney Massman Assistant General Counsel Missouri Public Service Commission 200 Madison St. Jefferson City, MISSOURI 65101 UNITED STATES Rodney.Massman@psc.mo.gov	John D. Borgmeyer Attorney Missouri Public Service Commission PO Box 360 Jefferson City, MISSOURI 65109 john.borgmeyer@psc.mo.gov
Missouri Public Service Commission		Valerie Groose 200 Madison St Jefferson City, MISSOURI 65109 valerie.groose@psc.mo.gov
Missouri Public Service Commission		Shelley S Brueggemann Missouri Bar No. 52173 Missouri Public Service Commission PO Box 360 , 65102 shelley.brueggemann@psc.mo.gov
Missouri Public Service Commission		Jennie Wells Paralegal Missouri Public Service Commission 200 Madison Street Jefferson City, MISSOURI 65101 jennie.wells@psc.mo.gov
Missouri Public Service		Jennifer Heintz Chief Litigation Attorney

Commission		Missouri Public Service Commission 200 Madison St PO Box 360 Jefferson City, MISSOURI 65102 jennifer.heintz@psc.mo.gov
Missouri Public Service Commission		Carrie L. Bumgarner PO Box NA Jefferson City, 65102 carrie.bumgarner@psc.mo.gov
Missouri Public Service Commission		Walter (Walt) Cecil walt.cecil@psc.mo.gov
Missouri Public Service Commission		Adam McKinnie 200 Madison Street Columbia, MISSOURI 65102 adam.mckinnie@psc.mo.gov
Missouri Public Service Commission		Dana Adams Missouri Public Service Commission 200 Madison St Jefferson City, MISSOURI 65101 dana.adams@psc.mo.gov
Missouri Public Service Commission		Jan Kay Davidson Utility Policy Analyst I Missouri Public Service Commission 200 Madison St Jefferson City, MISSOURI 65101 janette.davidson@psc.mo.gov
Missouri River Energy Services	Cynthia Bogorad Spiegel & McDiarmid LLP 1875 Eye Street, N.W. Suite 700 Washington, DISTRICT OF COLUMBIA 20006 UNITED STATES cynthia.bogorad@spiegelmc.com	Jeffrey M. Bayne Attorney Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St., NW, Suite 700 Washington, DISTRICT OF COLUMBIA 20006 jeffrey.bayne@spiegelmc.com
Missouri River Energy Services		Anree G Little Associate Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St NW Ste 700 Washington, DISTRICT OF COLUMBIA 20006 Anree.little@spiegelmc.com
Missouri River Energy Services		E Service Spiegel & McDiarmid LLP 1875 Eye St, NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 eService@spiegelmc.com
Missouri River Energy Services		Terry Wolf terry.wolf@mrenergy.com
MTDUs	Cynthia Bogorad Spiegel & McDiarmid LLP 1875 Eye Street, N.W. Suite 700 Washington, DISTRICT OF COLUMBIA 20006 UNITED STATES cynthia.bogorad@spiegelmc.com	Jeffrey M. Bayne Attorney Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St., NW, Suite 700 Washington, DISTRICT OF COLUMBIA 20006 jeffrey.bayne@spiegelmc.com
MTDUs		Anree G Little Associate Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St NW Ste 700 Washington, DISTRICT OF COLUMBIA 20006 Anree.little@spiegelmc.com
MTDUs		E Service Spiegel & McDiarmid LLP 1875 Eye St, NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 eService@spiegelmc.com
NATURAL RESOURCES DEFENSE COUNCIL	Elizabeth Pearlman Attorney NATURAL RESOURCES DEFENSE COUNCIL	

	20 N WACKER DR STE 1600 CHICAGO, ILLINOIS 60606 UNITED STATES tpearlman@nrdc.org	
NATURAL RESOURCES DEFENSE COUNCIL	Elizabeth Pearlman Attorney NATURAL RESOURCES DEFENSE COUNCIL 20 N WACKER DR STE 1600 CHICAGO, ILLINOIS 60606 UNITED STATES tpearlman@nrdc.org	
NextEra Energy Resources, LLC	Gunnar Birgisson Senior Attorney NextEra Energy Resources, LLC 801 Pennsylvania Ave., N.W. Suite 220 Washington, DISTRICT OF COLUMBIA 20004 UNITED STATES gunnar.birgisson@nee.com	
NRG Power Marketing LLC	Cortney Slager Assistant General Counsel - Re NRG Companies 804 Carnegie Center Princeton, NEW JERSEY 08540 UNITED STATES cortney.slager@nrg.com	Neal Fitch Sr. Director, Regulatory Affai NRG Energy, Inc. 804 CARNEGIE CTR PRINCETON, NEW JERSEY 08540 neal.fitch@nrg.com
NRG Power Marketing LLC	Jennifer Hsia Managing Senior Counsel NRG Energy 910 Louisiana Street Houston, TEXAS 77002 UNITED STATES jennifer.hsia@nrg.com	
Organization of MISO States, Inc.	Brad Pope Organization of MISO States, I 811 E WASHINGTON AVE STE 400 MADISON, WISCONSIN 53703 UNITED STATES brad@misostates.org	Marcus Hawkins Organization of MISO States, Inc. 811 E Washington Ave Suite 400 Madison, WISCONSIN 53703 marcus@misostates.org
Potomac Economics, Ltd.	David Patton Potomac Economics 9990 FAIRFAX BLVD STE 560 FAIRFAX, VIRGINIA 22030 UNITED STATES dpatton@potomaceconomics.com	
Public Service Commission of Wisconsin	Sophia Rogers Assistant General Counsel PO Box NA MADISON, WISCONSIN 53705-7854 UNITED STATES sophia.rogers1@wisconsin.gov	
Public Utility Commission of Texas	Debra Roby Partner Washington Energy Law LLP 900 17TH ST NW STE 500-A WASHINGTON, DISTRICT OF COLUMBIA 20006 UNITED STATES droby@washingtonenergylaw.com	Jessie Lance Jessie Lance Public Utility Commission of Texas PO BOX 13326 AUSTIN, TEXAS 78711 jessie.lance@puc.texas.gov
Public Utility Commission of Texas	Alan Robbins Partner Washington Energy Law LLP 900 17TH ST NW STE 500-A WASHINGTON, DISTRICT OF COLUMBIA 20006 UNITED STATES arobbins@washingtonenergylaw.com	
Shell Energy North America (U.S.), L.P.	Matthew Picardi Vice President Shell Energy North America (US), L.P. 36 Pinewood Ave. Saratoga Springs, NEW YORK 12866	

	UNITED STATES Matthew.Picardi@shell.com	
Sierra Club	Gregory Wannier Associate Attorney Sierra Club 2101 Webster St., Ste. 1300 Oakland, CALIFORNIA 94612 UNITED STATES greg.wannier@sierraclub.org	
Sierra Club	Casey Roberts Senior Attorney Sierra Club 1536 Wynkoop St, Suite 200 Denver, COLORADO 80202 UNITED STATES casey.roberts@sierraclub.org	
SLEMCO and Concordia Elec. Cooperatives	Gregg Ottinger Attorney - Duncan & Allen INDIVIDUAL 1730 Rhode Island Avenue, NW Suite 700 Washington, DISTRICT OF COLUMBIA 20036-3115 UNITED STATES gdo@duncanallen.com	
Solar Energy Industries Association	Melissa Alfano Manager of Regulatory Affairs Solar Energy Industries Association 1425 K Street, N.W., Suite 1000 Washington, DISTRICT OF COLUMBIA 20005 UNITED STATES malfano@seia.org	Gizelle Wray Manager of Regulatory Affairs Solar Energy Industries Association 1425 K St NW Ste. 1000 Washington, DISTRICT OF COLUMBIA 20005 gwrap@seia.org
Solar Energy Industries Association		Sean Gallagher Solar Energy Industries Association 1425 K St NW Suite 1000 Washington, DISTRICT OF COLUMBIA 20005 sgallagher@seia.org
Southern Illinois Power Cooperative	Barry Cohen Special Counsel McCarter & English LLP 1301 K Street, N.W. Suite 1000 West Washington, DISTRICT OF COLUMBIA 20005 UNITED STATES bcohen@mccarter.com	
Southern Minnesota Municipal Power Agency	Cynthia Bogorad Spiegel & McDiarmid LLP 1875 Eye Street, N.W. Suite 700 Washington, DISTRICT OF COLUMBIA 20006 UNITED STATES cynthia.bogorad@spiegelmc.com	Jeffrey M. Bayne Attorney Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St., NW, Suite 700 Washington, DISTRICT OF COLUMBIA 20006 jeffrey.bayne@spiegelmc.com
Southern Minnesota Municipal Power Agency		Anree G Little Associate Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St NW Ste 700 Washington, DISTRICT OF COLUMBIA 20006 Anree.little@spiegelmc.com
Southern Minnesota Municipal Power Agency		E Service Spiegel & McDiarmid LLP 1875 Eye St, NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 eService@spiegelmc.com
Southwest Louisiana Electric Membership Corporation	Cynthia Bogorad Spiegel & McDiarmid LLP 1875 Eye Street, N.W. Suite 700 Washington, DISTRICT OF COLUMBIA 20006	Jeffrey M. Bayne Attorney Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St., NW, Suite 700

	UNITED STATES cynthia.bogorad@spiegelmc.com	Washington, DISTRICT OF COLUMBIA 20006 jeffrey.bayne@spiegelmc.com
Southwest Louisiana Electric Membership Corporation		Anree G Little Associate Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St NW Ste 700 Washington, DISTRICT OF COLUMBIA 20006 Anree.little@spiegelmc.com
Southwest Louisiana Electric Membership Corporation		E Service Spiegel & McDiarmid LLP 1875 Eye St, NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 eService@spiegelmc.com
Southwest Louisiana Electric Membership Corporation		Gregg D Ottinger Attorney - Duncan & Allen INDIVIDUAL 1730 Rhode Island Avenue, NW Suite 700 Washington, DISTRICT OF COLUMBIA 20036-3115 gdo@duncanallen.com
Southwest Louisiana Electric Membership Corporation		David W Sandefur Principle Engineer / Owner 967 E NICHOLAS LN ELLETTTSVILLE, INDIANA 47429 dwsandefur@gmail.com
Sustainable FERC Project	John Moore Senior Attorney Sustainable FERC Project 2 N Riverside Plz Ste 2250 RTS-RETURN TO SENDER Chicago, ILLINOIS 60606-2640 UNITED STATES moore.fercproject@gmail.com	
Sustainable FERC Project	John Moore Senior Attorney 30 North wacker Chicago, ILLINOIS 60606 UNITED STATES jmoore@nrdc.org	
Texas Industrial Energy Consumers	Katherine Coleman Attorney O'Melveny & Meyers LLP 303 Colorado St. Suite 2750 Austin, TEXAS 78701 UNITED STATES kcoleman@omm.com	John Hubbard O'Melveny & Myers LLP 303 COLORADO ST STE 2750 AUSTIN, TEXAS 78701 jhubbard@omm.com
Texas Industrial Energy Consumers		Kellie Balli Paralegal O'Melveny & Meyers LLP 303 COLORADO ST STE 2750 AUSTIN, TEXAS 78701 kballi@omm.com
The Retail Energy Supply Association	Elizabeth Whittle Partner Nixon Peabody LLP 799 9TH ST NW STE 500 WASHINGTON, DISTRICT OF COLUMBIA 20001 UNITED STATES ewhittle@nixonpeabody.com	
Upper Michigan Energy Resources Corporation	Conor Ward Attorney WEC Energy Group, Inc. 231 W. Michigan Street A292 Milwaukee, WISCONSIN 53203 UNITED STATES conor.ward@wecenergygroup.com	FERC AT WECENERGYGROUP. Federal Regulatory Affairs Gro WEC Energy Group 231 West Michigan Street Milwaukee, WISCONSIN 53201 ferc@wecenergygroup.com
Upper Michigan Energy Resources Corporation		Beth Martin Project Manager Wisconsin Electric 333 W. Everett Street

		Milwaukee, WISCONSIN 53012 beth.martin@we-energies.com
Wabash Valley Power Association, Inc.	Randolph Holt General Counsel Parr Richey LLP 6702 Intech Boulevard Indianapolis, INDIANA 46278 UNITED STATES r_holt@wvpa.com	**Jeremy Lee Fetty Attorney Parr Richey Obremskey & Morton PO Box 668 Lebanon, INDIANA 46052-0668
Wisconsin Electric Power Company	Conor Ward Attorney WEC Energy Group, Inc. 231 W. Michigan Street A292 Milwaukee, WISCONSIN 53203 UNITED STATES conor.ward@wecenergygroup.com	FERC AT WECENERGYGROUP. Federal Regulatory Affairs Gro WEC Energy Group 231 West Michigan Street Milwaukee, WISCONSIN 53201 ferc@wecenergygroup.com
Wisconsin Electric Power Company		Beth Martin Project Manager Wisconsin Electric 333 W. Everett Street Milwaukee, WISCONSIN 53012 beth.martin@we-energies.com
Wisconsin Public Service Corporation	Conor Ward Attorney WEC Energy Group, Inc. 231 W. Michigan Street A292 Milwaukee, WISCONSIN 53203 UNITED STATES conor.ward@wecenergygroup.com	FERC AT WECENERGYGROUP. Federal Regulatory Affairs Gro WEC Energy Group 231 West Michigan Street Milwaukee, WISCONSIN 53201 ferc@wecenergygroup.com
Wisconsin Public Service Corporation		Beth Martin Project Manager Wisconsin Electric 333 W. Everett Street Milwaukee, WISCONSIN 53012 beth.martin@we-energies.com
WPPI Energy	Cynthia Bogorad Spiegel & McDiarmid LLP 1875 Eye Street, N.W. Suite 700 Washington, DISTRICT OF COLUMBIA 20006 UNITED STATES cynthia.bogorad@spiegelmc.com	Jeffrey M. Bayne Attorney Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St., NW, Suite 700 Washington, DISTRICT OF COLUMBIA 20006 jeffrey.bayne@spiegelmc.com
WPPI Energy		Anree G Little Associate Spiegel & McDiarmid LLP Spiegel & McDiarmid LLP 1875 Eye St NW Ste 700 Washington, DISTRICT OF COLUMBIA 20006 Anree.little@spiegelmc.com
WPPI Energy		E Service Spiegel & McDiarmid LLP 1875 Eye St, NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 eService@spiegelmc.com
WPPI Energy		Thomas Hanrahan General Counsel WPPI Energy 1425 Corporate Center Drive Sun Prairie, WISCONSIN 53590 thanrahan@wppienergy.org
Xcel Energy Services Inc.	David Pettit Assistant General Counsel Xcel Energy Services Inc. 1800 Larimer Street Suite 1400 Denver, COLORADO 80202 UNITED STATES david.e.pettit@xcelenergy.com	Diane Watkins Manager, Federal Regulatory Af Xcel Energy Services Inc. 1800 Larimer St Suite 1200 Denver, COLORADO 80202 diane.watkins@xcelenergy.com
Xcel Energy Services Inc.		Kari C Hassler Senior Manager, Market Operati Xcel Energy Services Inc.

1800 LARIMER ST STE 1000
DENVER, COLORADO 80202
kari.hassler@xcelenergy.com

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FERC Order For Which Review is Requested

Midcontinent Independent System Operator, Inc., Order Addressing Arguments Raised on Rehearing, Docket No. ER22-496-002, 183 FERC ¶ 61,112 (May 18, 2023)

183 FERC ¶ 61,112
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

Midcontinent Independent System Operator, Inc.

Docket No. ER22-496-002

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued May 18, 2023)

1. On August 31, 2022, the Commission issued an order¹ rejecting Midcontinent Independent System Operator, Inc.'s (MISO) proposed revisions, under section 205 of the Federal Power Act (FPA),² to its Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) to require Market Participants representing Load Serving Entities (LSE)³ participating in MISO's Planning Resource Auction (Auction) to implement a Minimum Capacity Obligation (MCO). On September 30, 2022, requests for rehearing were filed by (1) MISO and (2) Entergy Services, LLC (Entergy) and Cleco Power (Cleco).

2. Pursuant to *Allegheny Defense Project v. FERC*,⁴ the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 180 FERC ¶ 61,142 (2022) (MCO Order).

² 16 U.S.C. § 824d.

³ For purposes of this order, references to LSEs also refer to Market Participants representing LSEs.

⁴ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

section 313(a) of the FPA,⁵ we are modifying the discussion in the MCO Order and continue to reach the same result in this proceeding, as discussed below.⁶

I. Background

3. As described in greater detail in the MCO Order,⁷ MISO's resource adequacy construct requires LSEs in each Local Resource Zone (Zone) to procure sufficient ZRCs to meet their respective Planning Reserve Margin Requirements (Reserve Requirements) for each Planning Year, so that the LSEs in each Zone meet their aggregate Reserve Requirements. MISO proposed that the MCO require Market Participants representing LSEs to procure, either through ownership or bilateral contracts, sufficient ZRCs to meet 50% of their LSEs' total Reserve Requirements prior to the last Day of the Auction offer window.⁸

4. MISO asserted that allowing LSEs to procure high percentages of their Reserve Requirements through the Auction introduces higher than acceptable risk that an LSE, and potentially all or a portion of MISO, will have insufficient capacity if the quantity of capacity offered into the Auction drops sharply, particularly in light of potential changes in MISO's anticipated resource mix.⁹ MISO further asserted that imposing an MCO will reduce the potential for capacity shortfalls in future Auctions because the MCO will

⁵ 16 U.S.C. § 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

⁶ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the MCO Order. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁷ MCO Order, 180 FERC ¶ 61,142 at P 2 (describing four options for an LSE to satisfy its Reserve Requirement through the procurement of Zonal Resource Credits (ZRC)).

⁸ *Id.* P 5 (also noting that this obligation will be subject to a *de minimis* exemption and that failure to satisfy the MCO will incur a non-compliance charge, which is set at 1.5 times the daily Cost of New Entry (CONE) for each deficient ZRC).

⁹ *Id.* P 3; see also *id.* PP 82-83 (claiming that the MCO will encourage forward planning and thus avoid future capacity shortfalls).

incent LSEs to contract forward for at least a portion of their Reserve Requirements.¹⁰ However, MISO also explained that it did not propose that the MCO create incentives for the construction of new generation.¹¹

5. MISO asserted that it had conducted a market power analysis that supports the MISO-wide implementation of the MCO,¹² and disputed arguments raised by protestors that MISO-wide implementation of the MCO would introduce opportunities for the exercise of seller market power.¹³ MISO further explained that it was not currently proposing to implement the MCO on a sub-regional basis and, prior to doing so, a market power analysis by Potomac Economics, Ltd, which is the MISO Independent Market Monitor (Market Monitor) would be filed at the Commission to provide stakeholders an opportunity to review and comment on the Market Monitor's findings.¹⁴

6. Entergy, among other entities, filed comments in support of the MCO proposal asserting that the MCO is "consistent with MISO's resource adequacy construct and that the Commission has recognized that 'MISO's [A]uction is not — and has never been — the primary mechanism for LSEs to procure capacity.'"¹⁵ It supported the MCO as a mechanism to limit the role of the Auction while still retaining an LSE's ability to procure a significant portion of its capacity through the Auction, which Entergy claims will help ensure reliability and reduce the risk of capacity shortfalls.¹⁶ Entergy also argued that the MCO proposal is consistent with an element of Southwest Power Pool, Inc.'s (SPP) resource adequacy construct, which includes a requirement for each LSE to demonstrate that it owns or has bilateral contracts sufficient to meet 100% of its summer and winter peak load plus a reserve margin, as well as a non-compliance penalty equal to

¹⁰ *Id.* P 6.

¹¹ *Id.* P 81; *see also* MISO February 9 Answer at 6 ("MISO has not proposed the MCO to incentivize construction of new generation.").

¹² MCO Order, 180 FERC ¶ 61,142 at P 11 (summarizing the results of that analysis).

¹³ *Id.* PP 88-89.

¹⁴ *See id.* PP 10, 87, 90.

¹⁵ *Id.* P 27 (quoting Entergy Comments at 11); *see also id.* P 76.

¹⁶ *See id.* PP 28-30.

125-200% CONE.¹⁷ In response to concerns regarding the likelihood of increased concentration of market share in MISO South, which could lead to Entergy becoming a pivotal supplier,¹⁸ Entergy stated that, if the MCO is adopted, Entergy will make any long-term surplus capacity available to LSEs in MISO South for purchase through bilateral contracting at each Entergy Operating Company's embedded cost-based rates, with contracts that are first filed with the Commission for review under FPA section 205.¹⁹

7. The Commission rejected the MCO proposal on August 31, 2022, finding that MISO had not demonstrated it to be just and reasonable and not unduly discriminatory or preferential.²⁰ In particular, MISO had not demonstrated that the MCO would address or mitigate resource adequacy concerns,²¹ nor reduce the likelihood of capacity shortfalls,²² but would instead simply shift a portion of the supply and demand for capacity from the Auction into the bilateral market in a given year.²³ The Commission was not persuaded by arguments that individual LSEs were undermining the purpose of the Auction by relying primarily on the Auction to procure capacity and found that the proposed MCO represented an administrative cap restricting the freedom of Market Participants to choose how to procure capacity that may adversely affect certain Market Participants.²⁴

¹⁷ *Id.*; Entergy Comments at 11-12 (citing *Sw. Power Pool, Inc.*, 164 FERC ¶ 61,092 (2018) (SPP Order)).

¹⁸ *See* MCO Order, 180 FERC ¶ 61,142 at P 57.

¹⁹ *Id.* P 75.

²⁰ *Id.* P 106.

²¹ *Id.* P 108 (explaining that, because “MISO’s resource adequacy construct is not a multi-year forward construct but rather the Auction is held approximately six weeks in advance of the Planning Year, and the proposed MCO requirement deadline just precedes the Auction . . . any capacity procured in the bilateral market to satisfy the MCO would likely be purchased from the same resources that would have otherwise been offered into the Auction”).

²² *Id.* P 109.

²³ *Id.* (noting also that, for the 2022/2023 Planning Year the proposed MCO “would not have affected the Auction’s outcome of a capacity shortfall in MISO North in a manner that supported reliability”).

²⁴ *Id.* P 110 (discussing the Auction’s role to procure capacity, increase transparency, provide a meaningful alternative to contracting for capacity bilaterally, and

8. The Commission also found that MISO had not adequately addressed concerns regarding the MCO proposal's potential impact on market power. First, the Commission explained that—as a general matter—the Auction, as a centralized market where capacity sellers are subject to market power mitigation, serves to discipline the bilateral capacity market and is “an important component of both MISO’s resource adequacy construct and the Commission’s approach to market power more broadly.”²⁵ In particular, the Commission noted that it had previously “cited to MISO’s annual capacity auctions in relieving market-based rate sellers of the obligation to submit indicative screens when requesting market-based rate authority.”²⁶ Additionally, the Commission identified evidence submitted by the Market Monitor which found that expected resource retirements in MISO South in the next three years, combined with the expiration of certain bilateral agreements, will provide Entergy with 41% market share in that region. The Commission noted in the MCO Order that MISO’s proposal did not address these concerns.²⁷

II. Rehearing Requests

9. Both rehearing requests challenge the Commission’s concerns regarding the exercise of market power associated with the MCO proposal, focusing on the Commission’s conclusion that MISO had not addressed such concerns relating to the expected concentration of market share in MISO South.²⁸ They argue that MISO has not proposed to apply the MCO on a sub-regional basis and that any such application of the MCO on a sub-regional basis will require a further section 205 filing, after a further market study by the Market Monitor.²⁹ MISO argues that the Commission failed to

noting that the overwhelming majority of capacity in MISO is procured through mechanisms other than the Auction); *id.* P 111 (explaining that entering into long-term bilateral agreements to procure capacity as compared to procuring capacity in the Auction each carry advantages and disadvantages).

²⁵ *Id.* P 112.

²⁶ *Id.* (citing *Refinements to Horizontal Mkt. Power Analysis for Sellers in Certain Reg’l Transmission Org. & Indep. Sys. Operator Mkts.*, Order No. 861, 168 FERC ¶ 61,040, at P 48 (2019), *order on reh’g*, Order No. 861-A, 170 FERC ¶ 61,106 (2020)).

²⁷ *See also id.* P 113 (acknowledging that MISO does not yet propose to implement the MCO on a sub-regional basis).

²⁸ MISO Rehearing Request at 6-7, 10; Entergy and Cleco Rehearing Request at 3, 10.

²⁹ Entergy and Cleco also assert that the record lacks evidence “that the Entergy Operating Companies have market power in MISO or will gain market power even in the

consider the use of an electronic bulletin board to increase transparency, allow for monitoring and mitigation, and ensure competitive bilateral contracting.³⁰ Entergy and Cleco argue that the Commission failed to consider that Entergy had committed in its pleadings to make “long-term surplus capacity” available to LSEs in MISO South for purchase through bilateral contracting, at each Entergy Operating Company’s embedded cost-based rates, “as necessary” to address market power concerns.³¹ Entergy and Cleco also argue that the MCO Order is inconsistent with Commission precedent in which—they claim—the Commission approved an analogous approach proposed by SPP.³²

10. On rehearing, MISO argues that the MCO proposal will serve as a “guardrail” that “seeks to address last-minute capacity shortfalls in the [Auction] by requiring a minimum level of prudent, forward planning by LSEs to ensure that sufficient capacity is available to meet their needs.”³³ Entergy and Cleco argue that the MCO will, in fact, “create incentives for additional capacity to enter the MISO market”³⁴ and need not single-handedly resolve all issues with MISO’s resource adequacy construct to be just and reasonable.³⁵

III. Discussion

11. We continue to conclude that MISO failed to carry its burden to show that the MCO proposal is just and reasonable, and on rehearing clarify that our rejection of this proposal turns on the concerns it poses regarding negative impacts on bilateral market dynamics. Here, both of the rehearing requests focus on the Commission’s reference to the expected concentration of market power in MISO South, arguing that MISO has not

circumstances posited by the Market Monitor in its protest.” Entergy and Cleco Rehearing Request at 10.

³⁰ MISO Rehearing Request at 7.

³¹ Entergy and Cleco Rehearing Request at 3, 5-6, 10-11 (also acknowledging this would be accomplished through a further section 205 filing to establish those cost-based rates).

³² *See id.* at 7-8, 10-11 (citing SPP Order, 164 FERC ¶ 61,092).

³³ MISO Rehearing Request at 5; *see also id.* at 4 (arguing allowing LSEs to rely on the Auction to procure the majority of their capacity undermines the purpose of the Auction); Entergy and Cleco Rehearing Request at 9 n.31.

³⁴ Entergy and Cleco Rehearing Request at 4-5.

³⁵ *Id.* at 8-10.

proposed to apply the MCO on a sub-regional basis and that any such application will require a further section 205 filing, after a further market study by the Market Monitor.³⁶

12. These arguments are unpersuasive. The Commission's references relating to the expected market conditions in MISO South were based on MISO's proposed regional application of the MCO in the instant filing, not any potential future sub-regional application. The Commission was cognizant that "MISO's proposal does not yet apply the MCO on a sub-regional basis" but still concluded that the MCO proposal did not adequately address market power issues.³⁷

13. To further elaborate, the Commission's reference to potential changes in market dynamics in MISO South was not separate from the Commission's finding that MISO failed to address concerns regarding the proposal's potential impact on market power. Rather, the discussion of the Market Monitor's concerns in the MCO Order, relating to expected increased market share in MISO South, was in the context of the Commission's finding that MISO's proposal would limit buyers' recourse to purchase capacity in the Auction, where all sellers are subject to market power mitigation, and undermine the important disciplining effect the Auction has on the bilateral capacity market.³⁸ This disciplining effect becomes all the more important as reserve margins throughout MISO tighten. Shifts in market dynamics, such as concentration of market share, may exacerbate these concerns. Particularly given the tightening of reserve margins in MISO as a whole and a capacity shortfall in MISO North/Central in the 2022/23 Auction,³⁹ under the MCO as proposed, entities in MISO South might struggle to identify and transact with capacity sellers in bilateral markets to meet half of their Reserve Requirements and would not be able to rely on the full disciplining effect of the Auction to mitigate possible exercises of market power in bilateral capacity markets. Moreover,

³⁶ See MISO Rehearing Request at 6-7; Entergy and Cleco Rehearing Request at 3, 10.

³⁷ *Id.* P 113. Contrary to Entergy and Cleco's assertion, Entergy and Cleco Rehearing Request at 13, the record contains a detailed discussion of Entergy's market share in MISO South, and how that market share is likely to increase and create the conditions for the exercise of market power. See Market Monitor Protest at 14-18.

³⁸ MCO Order, 180 FERC ¶ 61,142 at P 112 ("Were the Commission to accept the 50% limitation, it would need to revisit its analysis for resources who relied on the presence of the Auction to make the showings needed to secure market-based rate authority.").

³⁹ See Entergy April 29 Answer at 2-3; MISO May 20 Answer at 9-10. This example is illustrative; the effects of the MCO when combined with the tightening of reserve margins are not necessarily limited to entities in MISO South.

arguments that the regional nature of the proposal alleviates market power concerns fail to recognize that MISO's proposal is applied to a capacity construct that enforces network constraints, sub-regional constraints, and Local Clearing Requirements.⁴⁰ Nothing in the rehearing requests rebuts the Commission's discussion of the importance of this disciplining effect of the Auction.⁴¹

14. Entergy and Cleco also argue that the Commission "failed to acknowledge MISO's proposal to address market power issues through an on-going program of market power analysis."⁴² But the proposal on which Entergy and Cleco relies reflects that MISO did not propose an "on-going program" of market power analysis, but rather a one-off market analysis, to be created at a future date and directed toward supporting the planned sub-regional implementation of the MCO,⁴³ not MISO's instant MCO application. The prospect that MISO would, in the future, prepare such a one-time analysis to support a potential modification to the MCO does not resolve the existing, unaddressed concerns that are articulated above and in the MCO Order regarding MISO's current proposal to implement the MCO.

15. We are also not persuaded that we should reach a different result based on Entergy's commitment to make "long-term surplus capacity" available to LSEs in MISO South for purchase through bilateral contracting, at "each Entergy Operating Company's embedded cost-based rates," "as necessary" to address market power concerns.⁴⁴ First, Entergy has not provided us with (and we therefore have not accepted) any section 205 filing that would implement this commitment.⁴⁵ We will not approve MISO's Tariff revisions implementing the MCO based on Entergy's non-binding commitments in its pleadings indicating that it intends to make a submission to attempt to resolve our concerns at a later date through section 205 filings of future bilateral contracts at cost-

⁴⁰ MISO, FERC Electric Tariff, Module E-1, § 69A.7 (35.0.0); *id.*, § 69A.7.1 (49.0.0).

⁴¹ See MCO Order, 180 FERC ¶ 61,142 at P 112. Moreover, the rehearing requests do not address that the Commission relied on this effect as to the showings made to secure market-based rate authority. See *id.*

⁴² Entergy and Cleco Rehearing Request at 6 & n.18.

⁴³ See Transmittal at 9; Transmittal, Tab A, Proposed Tariff Section § 69A7.1A.e; MISO April 8 Deficiency Letter Response at 3-4.

⁴⁴ Entergy and Cleco Rehearing Request at 3, 5-6, 10-11.

⁴⁵ We cannot prejudge the adequacy of a proposal that is not before us, such that it is unclear whether we would be able to accept any such proposal.

based rates. Second, absent such a concrete proposal, Entergy's commitment is unclear. For example, Entergy has promised to make "long-term surplus capacity" available at "embedded cost-based rates" "as necessary" to address market power concerns. But we have nothing before us that clearly defines what Entergy means by "embedded cost-based rates,"⁴⁶ under what circumstances Entergy believes that transacting at cost-based rates will be "necessary" to address market power concerns, or what constitutes "long-term surplus capacity." Absent a concrete proposal before us—one that commenters can weigh in on and we can fully consider—we are not in a position to assess Entergy's conceptual proposal, or what the ramifications of that proposal would be, including whether it would help allay concerns regarding market power that stem from the MCO. Based on these considerations, Entergy's promise to raise these issues in a future proceeding does not address or resolve the market power concerns raised in this proceeding.

16. MISO contends that the Commission failed to consider the existence of a bulletin board which could be used to increase transparency, allow for monitoring and mitigation, and ensure competitive bilateral contracting as a solution to addressing concerns over market power.⁴⁷ MISO's assertions regarding the potential use of a bulletin board are not tethered to its proposal or otherwise supported in the record. MISO has not shown there are—and has not proposed—appropriate rules for such a bulletin board to accomplish these ends. To the contrary, use of the existing electronic bulletin board continues to be voluntary, and MISO has disclaimed any knowledge of "to what extent Market Participants utilize the bulletin board or whether executed transactions are actually posted to the bulletin board."⁴⁸

17. Entergy and Cleco further assert that the Commission's rejection of the MCO is inconsistent with the SPP Order, which—they claim—approved analogous amendments to SPP's tariff requiring that "each LSE to demonstrate that it owns or has bilateral contracts sufficient to meet 100% of its summer and winter peak load plus a reserve

⁴⁶ The lack of clarity on this term is illustrative, as it may reflect that Entergy intends to submit rates that, on a fleet-wide basis, include fixed costs, such as depreciation, and a rate of return. By contrast, Auction capacity supply offers are subject to mitigation if they exceed unit-specific reference levels based on unit-specific going-forward costs.

⁴⁷ MISO Rehearing Request at 7.

⁴⁸ See MISO Deficiency Letter Response at 7-8; *cf.* Market Monitor Protest to Deficiency Letter Response at 4-5 (suggesting that a mandatory bulletin board, with appropriate rules, might be a "means to increase transparency and allow for an effective monitoring and mitigation framework").

margin,” subject to a noncompliance penalty.⁴⁹ But Entergy and Cleco have not shown that SPP and MISO are similarly situated so as to make the acceptance of the proposal at issue in the SPP Order persuasive to the outcome to this case. One readily apparent distinction is that SPP does not administer a centralized capacity auction at all,⁵⁰ such that SPP takes a qualitatively different overall approach to resource adequacy than MISO. We have recognized the importance of this distinction between the MISO and SPP markets⁵¹ and have recognized in the MCO Order that the existence of a robust capacity Auction with market power mitigation in MISO serves an important disciplining effect on the bilateral capacity market in MISO that has formed the predicate for other Commission decisions.⁵² We thus do not find that the SPP Order is apposite to the facts of this case.

18. Because we continue to conclude that the MCO proposal did not adequately address concerns regarding negative impacts on market dynamics, which have not been adequately addressed by the MCO proposal or the arguments on rehearing, we sustain the conclusion of the MCO Order that MISO has failed to carry its FPA section 205 burden to demonstrate that its proposal is just and reasonable. In light of these concerns, we clarify that we are not rejecting the MCO proposal based on a conclusion that the proposal fails to accomplish MISO’s stated goals.⁵³ We also note that Entergy and Cleco are incorrect in asserting that the MCO Order rejected the MCO proposal based on the

⁴⁹ Entergy and Cleco Rehearing Request at 7-8, 11-12 (also arguing that the Commission encouraged, in this case, the potential to address market power concerns on a prospective basis, without establishing further proceedings to address market power issues).

⁵⁰ See SPP Order, 164 FERC ¶ 61,092 at P 79.

⁵¹ See *Refinements to Horizontal Mkt. Power Analysis for Sellers in Certain Reg'l Transmission Org. & Indep. Sys. Operator Markets*, Order No. 861, 168 FERC ¶ 61,040 at PP 46-48, *order on reh'g*, Order No. 861-A, 170 FERC ¶ 61,106 (discussing the disciplining effect of MISO’s annual capacity auctions, whereas “SPP market lacks a transparent market price for capacity and SPP does not review or mitigate capacity prices,” in explaining why the Commission was maintaining the requirement that SPP submit screens for capacity sales).

⁵² See MCO Order, 180 FERC ¶ 61,142 at P 112.

⁵³ See *id.* PP 108-11.

conclusion that it fails to comprehensively resolve all concerns with capacity procurement in the MISO region.⁵⁴

The Commission orders:

In response to the requests for rehearing, the MCO Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.

Commissioner Christie is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

⁵⁴ See, e.g., Entergy and Cleco Rehearing Request at 9-10.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Midcontinent Independent System Operator, Inc.

Docket No. ER22-496-002

(Issued May 18, 2023)

DANLY, Commissioner, *dissenting*:

1. I disagree with how this proceeding was handled and therefore I dissent from this “Order Addressing Arguments Raised on Rehearing.”¹

2. In my statement to the underlying order rejecting Midcontinent Independent System Operator, Inc.’s (MISO) tariff revisions to implement a Minimum Capacity Obligation (MCO),² I concurred in the judgment and explained that, while I share my colleagues’ concerns regarding the proposal’s potential impact on market power, I was not persuaded by the entirety of the Commission’s reasoning.³

3. Specifically, I pointed out⁴ that whether the Commission finds that the proposal accomplishes MISO’s goals is not the standard under section 205 of the Federal Power Act (FPA).⁵ Instead, the question under FPA section 205 is *always* whether the proposal is just and reasonable.⁶ I am pleased that the Commission has retracted that basis for rejection in today’s order.⁷

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 183 FERC ¶ 61,112 (2023) (MCO Rehearing Order).

² *See Midcontinent Indep. Sys. Operator, Inc.*, 180 FERC ¶ 61,142 (2022) (MCO Order).

³ *Id.* (Danly, Comm’r, concurring in the judgment at P 1).

⁴ *See id.* (Danly, Comm’r, concurring in the judgment at P 1 n.1).

⁵ 16 U.S.C. § 824d.

⁶ MCO Order, 180 FERC ¶ 61,142 (Danly, Comm’r, concurring in the judgment at P 1 n.1).

⁷ MCO Rehearing Order, 183 FERC ¶ 61,112 at P 18 (“we clarify that we are not rejecting the MCO proposal based on a conclusion that the proposal fails to accomplish

4. I am disappointed, however, that my colleagues did not pursue a paper hearing in this proceeding. As I explained in my separate statement to the underlying order, more information is needed regarding the possible exercise of market power.⁸ After considering the arguments on rehearing, I am even more firmly convinced that we should have sought further development of the record.

5. Simply put, I am not persuaded by today's order. This case turns on the issue of market power. If the Commission could have determined that there were no market power concerns on a regional basis, then we should not have rejected the proposal. A market tariff, like any other tariff, need not be designed to our liking. In order to pass muster under FPA section 205, it need merely be just and reasonable. In this case, the Commission failed to sufficiently explore the market power issues raised by the litigants both initially and on rehearing. My questions on this subject remain unanswered and I am not convinced that the Commission's determinations on rehearing are supported by the record.

6. Today's order states that "the discussion of the Market Monitor's concerns in the MCO Order, relating to expected increased market share in MISO South, was in the context of the Commission's finding that MISO's proposal would limit buyers' recourse to purchase capacity in the Auction, where all sellers are subject to market power mitigation, and undermine the important disciplining effect the Auction has on the bilateral capacity market."⁹ But as I indicate above, it is not clear that there is a regional market power issue at all, and the Commission did not see fit to explore the matter; instead, the Commission points back to the "disciplining effect the Auction has." Does this mean that the Commission would *never* entertain an MCO proposal in MISO? That certainly seems to be the implication.¹⁰ The Commission asserts that "arguments that the

MISO's stated goals") (citing MCO Order, 180 FERC ¶ 61,142 at PP 108-11).

⁸ MCO Order, 180 FERC ¶ 61,142 (Daly, Comm'r, concurring in the judgment at P 1).

⁹ MCO Rehearing Order, 183 FERC ¶ 61,112 at P 13.

¹⁰ See *id.* (citing MCO Order, 180 FERC ¶ 61,142 at P 112 ("Were the Commission to accept the 50% limitation, it would need to revisit its analysis for resources who relied on the presence of the Auction to make the showings needed to secure market-based rate authority.")); *id.* ("This disciplining effect becomes all the more important as reserve margins throughout MISO tighten."); *id.* ("Particularly given the tightening of reserve margins in MISO as a whole and a capacity shortfall in MISO North/Central in the 2022/23 Auction, under the MCO as proposed, entities in MISO South might struggle to identify and transact with capacity sellers in bilateral markets to meet half of their Reserve Requirements and would not be able to rely on the full

regional nature of the proposal alleviates market power concerns fail to recognize that MISO's proposal is applied to a capacity construct that enforces network constraints, sub-regional constraints, and Local Clearing Requirements."¹¹ One of my colleagues rightly points out that MISO may submit another filing.¹² But, as I have said before, the fact that MISO can file again, with all of the time, expense, and effort that such a successive filing would require is, at best, cold comfort.¹³

7. As the Commission today recognizes, "Entergy . . . argued that the MCO proposal is consistent with an element of Southwest Power Pool, Inc.'s (SPP) resource adequacy construct, which includes a requirement for each LSE to demonstrate that it owns or has bilateral contracts sufficient to meet 100% of its summer and winter peak load plus a reserve margin, as well as a non-compliance penalty equal to 125-200% CONE."¹⁴ In responding to this argument, the Commission asserts that "Entergy and Cleco have not shown that SPP and MISO are similarly situated so as to make the acceptance of the proposal at issue in the SPP Order persuasive to the outcome to this case."¹⁵ Fair enough. Different markets, different rules. But one has to ask: What is the significance of the market differences? Do these differences mean that MISO could never establish *any* kind of minimum capacity obligation? If so, why? Though it scarcely bears repeating, under the FPA the question is not whether the Commission favors the current construct over the proposed replacement rate. Instead, we approve rates that are just and reasonable. The fact that the Commission might favor an auction over the bilateral procurement of capacity does not require the rejection of a proposed tariff revision establishing a minimum capacity obligation.

8. The Commission is not without recourse in the face of market power. We could always apply indicative screens for market-based rate authority, just as we did in SPP to

disciplining effect of the Auction to mitigate possible exercises of market power in bilateral capacity markets.") (citations omitted).

¹¹ *Id.*

¹² *See id.* (Christie, Comm'r, concurring at P 2) ("There is nothing inherently wrong with an MCO in the MISO capacity market – which, we should remember, is voluntary – and if MISO can resolve such concerns, the outcome of a future filing should not be predetermined by our order herein.").

¹³ MCO Order, 180 FERC ¶ 61,142 (Danly, Comm'r, concurring in the judgment at P 1).

¹⁴ MCO Rehearing Order, 183 FERC ¶ 61,112 at P 6.

¹⁵ *Id.* P 17.

protect against the exercise of market power. But without delving into the threshold question of whether there actually is the possibility of market power being exercised can the Commission truly be said to have engaged in reasoned decision making?

For these reasons, I respectfully dissent.

James P. Danly
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Midcontinent Independent System Operator, Inc.

Docket No. ER22-496-002

(Issued May 18, 2023)

CHRISTIE, Commissioner, *concurring*:

1. I concur with sustaining the result of the Commission's August 31, 2022 order in Docket Nos. ER22-496-000 and ER22-496-001, which rejected MISO's Minimum Capacity Obligation (MCO) proposal.¹ I write separately to emphasize the following.

2. As I indicated in my concurrence to the MCO Order, I voted to reject MISO's MCO proposal only because of the potential market power concerns raised by the MISO Independent Market Monitor.² There is nothing inherently wrong with an MCO in the MISO capacity market – which, we should remember, is voluntary – and if MISO can resolve such concerns, the outcome of a future filing should not be predetermined by our order herein. Indeed, I appreciate the concerns expressed by MISO and other parties in this proceeding that an overreliance by load-serving entities (LSEs) on MISO's capacity auction may jeopardize the reliability of the MISO system. In my prior concurrence, I emphasized the primary responsibility of the MISO states in ensuring their LSEs have adequate resources to serve consumers:

No one disputes that the MISO capacity market has always been a purely *residual* option; it is not the primary option for an LSE to obtain the resources needed to ensure reliability. Importantly, states need to focus on their own authority to ensure adequate generating resources to serve their citizens

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 180 FERC ¶ 61,142 (2022) (MCO Order).

² *Id.* (Christie, Comm'r, concurring at P 2 (citing Market Monitor Protest, Docket No. ER22-496-000, at 13-18)) (Christie Concurrence), <https://www.ferc.gov/news-events/news/commissioner-christies-concurrence-miso-resource-adequacy-construct-proceedings>. I also issued this concurrence to the order accepting MISO's new seasonal resource adequacy construct. *Midcontinent Indep. Sys. Operator, Inc.*, 180 FERC ¶ 61,141 (2022) (Christie, Comm'r, concurring), *order on reh'g*, 182 FERC ¶ 61,096 (2023).

and not default to an administrative construct regulated by FERC.³

For the reasons given above, I respectfully concur.

Mark C. Christie
Commissioner

³ Christie Concurrence at P 4 (emphasis in original, footnotes omitted); *see also id.* P 3.

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